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10 *North American Dealer Co-Op.*

11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13
14 NORTH AMERICAN DEALER CO-OP,

15 Plaintiff,

16 v.

17 DICK L. ROTTMAN; JEFFREY P.
18 SHAFFER; JANICE LYNN BOWMAN,
19 CAROL B. INGALLS; BRADLEY A.
PEARCE, R. SCOTT ROTTMAN,
20 individuals; A AND H INSURANCE, INC.,
a Nevada corporation; WESTERN THRIFT
& LOAN, a Nevada corporation, and John
Does I through XX, Doe Corporations I
through XX and Doe Organizations I
through XX,

21 Defendants.

22 Case No. 3:11-cv-00698-LRH-VPC

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24 **REPLY IN SUPPORT OF MOTION FOR**
ORDER TO SHOW CAUSE WHY
PREJUDGMENT WRIT OF
ATTACHMENT SHOULD NOT ISSUE

25 Plaintiff NORTH AMERICAN DEALER CO-OP (“NADC”), responds to the opposition
26 filed by Defendants to NADC’s motion for an order directing defendants to show cause why a
27 prejudgment writ of attachment should not issue. This reply is based on Chapter 31 of the Nevada
28 Revised Statutes, the exhibits and affidavits attached to the motion, the pleadings and papers on
file herein, and any other evidence the court may wish to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The facts of this case are not difficult. NADC forwarded \$17,000,000 to Western Insurance Company ("Western") and/or Access insurance Services ("Access") to hold in a fiduciary capacity of which at least \$8,250,000 should remain available. Both Western and Access were controlled by the Defendants. The money is now, apparently gone. When the fact that the money is missing is considered with the repeated representations by the individual Defendants that the money was being held in a fiduciary account in trust for NADC, only one conclusion can be drawn—the money is unaccounted for because of Defendants actions, inactions, and misrepresentations. The misappropriation by Defendants of over \$8.2 million is justifiable grounds upon which this Court can issue a prejudgment writ of attachment.

The causes of action asserted by NADC are not, as Defendants assert, solely based upon a theory of piercing the corporate veil. (Opp'n to Mot. at 9:2-6, Dkt. #23). Rather NADC has asserted affirmative claims against the Defendants for fraud, misrepresentation, embezzlement, conversion, and conspiracy. Although NADC has alleged sufficient facts to pierce the corporate veil, NADC need not pierce the corporate veil to assert liability for these claims for relief. Because the facts and evidence before this Court demonstrate that NADC is likely to succeed in its claims and because there is an apparent and obvious risk that the Defendants will continue to misappropriate funds making collection of a judgment difficult if not impossible, NADC is entitled to a prejudgment writ of attachment as set forth in its motion for order to show cause.

NADC therefore requests that this Court enter an order to show cause why a prejudgment writ of attachment should not issue which complies with NRS 31.024. A proposed order is attached hereto as **Exhibit 1**.

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1 **II. Legal Analysis**

2 **A. A prejudgment writ may issue in tort claims and where a contract is tainted
3 with fraud.**

4 Chapter 31 of the Nevada Revised Statutes governs the award of a prejudgment writ of
5 attachment and the grounds upon which a writ may be issued. NRS 31.013. The Nevada statute
6 contemplates that a writ of attachment will issue: (1) in contract claims; (2) where attachment is
7 allowed by law; and (3) in "any case" where extraordinary circumstances exist. NRS 31.013. In a
8 decision made after surveying several state's attachment statutes, the Tenth Circuit agreed that in
9 Oklahoma, "the obligation or liability must either arise from contract or from a wrong growing out
10 of a contract tainted with fraud." Investors Royalty Co. v. Market Trend Survey, 206 F.2d 108,
11 110-11 (10th Cir. 1953). The statute analyzed in that case was much more restrictive than the
12 Nevada statute which provides that the prejudgment writ shall issue in "any case" where
13 circumstances so warrant. The Nevada statute is clear on its face that a prejudgment writ may
14 issue in tort claims and contract claims alike. However, no case has determined when
15 "extraordinary circumstances" exist for issuance of a writ of attachment under Chapter 31.

16 **B. Plaintiff is entitled to a prejudgment writ based upon the money due under
17 the contract tainted with fraud.**

18 A valid contract existed between Western and NADC pursuant to which Western and/or
19 Access was obligated to hold funds forwarded by NADC in a fiduciary capacity. The officers and
20 directors of Western and Access represented on many occasions that the money was held in a
21 segregated, collateral reserve account in trust for NADC. (Mot. for Order at 4:12-27, Dkt. #16).
22 Those representations were false when made and Defendants have made no attempt to deny the
23 falsity of the representations concerning the nature collateral reserve account.

24 However, even if the misrepresentations had not been made and relied upon, the fact
25 remains that money held by Western and Access in a fiduciary capacity is unaccounted for. Those
26 who had direct control and access to the collateral reserve account have depleted the account.
27 While NADC has not yet conducted full discovery on the current whereabouts of all \$8.2 million,
28 the individual Defendants were those with authority and direct control over the account. No other
entity could or did take the money and Defendants have not bothered to deny that they were not

1 responsible for the account. The contract between Western and NADC appears to be nothing
2 more than a sham perpetrated by the Defendants to obtain control and ownership of more than
3 \$8.2 million.

4 For example, defendants have testified that they diverted at least \$4 million of the funds to
5 purchase stock in Western. (Mot. for Order at 7:1-3 & Ex. 11, Dkt. #16). That is an unauthorized
6 diversion of \$4 million which Defendants represented was held in trust and in a fiduciary
7 capacity. As additional evidence that the contract was tainted with fraud, Access filed bankruptcy
8 and Western is in liquidation and neither proceeding has listed the more than \$8.2 million as
9 existing in the collateral reserve account. The money which belonged to NADC appears to have
10 been misappropriated by the officers and directors of Western and Access.

11 **C. Extraordinary circumstances exist in this case because Defendants have not
12 denied and cannot deny that the money to be held in the collateral reserve
13 account is depleted; and that the Defendants depleted the account.**

14 NADC has asserted fraud-based causes of action against the Defendants for depleting a
15 collateral reserve account which was to be held in a fiduciary capacity by the entities over which
16 the Defendants had ownership and control. Plaintiff has clearly, and not in a conclusory fashion,
17 pled and supported facts regarding the nature of the collateral reserve account held by Western
18 and Access. Despite the allegations in the complaint, the evidence and direct statements attached
19 to the motion for attachment, and the insolvency of entities which were to have held money for
20 NADC, Defendants have not produced a single affidavit or document disputing the facts of this
21 case as represented by NADC. Rather, Defendants have produced affidavits asserting that no
contract existed between NADC and the Defendant entities herein.

22 Missing from Defendants' opposition to the motion for order to show cause why a
23 prejudgment writ of attachment should not issue is: (1) any distinct evidence or documentation
24 showing any balance in the collateral reserve account; (2) a denial of wrongdoing by the
25 Defendants with respect to the missing \$8.2 million; (3) documents or testimony demonstrating
26 that Defendants did not perpetrate a fraud against NADC; or (4) documents or testimony that
27 Defendants were otherwise the victims of a fraud perpetrated against them. The facts which have
28 been established by the documents and affidavits are as follows: (1) the collateral reserve account

1 should have a balance of \$8.25 million (Aff. of H. Bailey, Ex. 2 to Mot. for Order, Dkt. #16); (2)
 2 the entities controlling the collateral reserve account are bankrupt (Opp'n to Mot. at); (3)
 3 Defendants were the individuals and entities who could have accessed the \$8.25 million; (4) there
 4 is no record of a collateral reserve account in the bankruptcy filings of Access, the entity which
 5 held the collateral reserve account; (5) Defendant Dick Rottman transferred at least \$4 million out
 6 of the collateral reserved funds to Western; (6) Defendants including Scott Rottman made a series
 7 of loans from funds held by Access through Western Thrift & Loan; and (7) NADC is out \$8.25
 8 million as a direct result of Defendants' actions.

9 Moreover, as indicated in the motion for order to show cause, NADC has submitted at
 10 least 1516 claims for approved claims to Western for payment from the collateral reserve account
 11 totaling more than \$2.5 million. (Mot. for Order at 6:8-11 & Ex. 1, Dkt. #16). Despite the clear
 12 obligation to pay, Defendants remain silent as to the obligation to pay. Defendant's silence and
 13 refusal to pay or respond to NADC's demands is additional evidence that the collateral reserve
 14 account is depleted and that Defendants are responsible for the loss.

15 It has become abundantly clear is that Defendants have depleted the collateral reserve
 16 account, authorizing and effecting the removal of funds which never belonged to either Western
 17 or Access. Rather than attempt to deny clear misrepresentations they have made, Defendants
 18 instead rely upon the illusion that Western and Access have simply "hit hard financial times . . ."
 19 (Opp'n to Mot. at 11:10). Even if that statement were true, the insolvency of Western and Access
 20 are not issues here other than to show that the individual Defendants depleted thos entities for
 21 their own benefit and to the detriment of NADC. The crux of this case is that the Defendants took
 22 the money held in a fiduciary capacity. The money never belonged to Western or Access. The
 23 collateral reserve account was to operate as a bank account would. Absent the undeniable actions
 24 of the Defendants, the money in the collateral reserve account would still be available to NADC
 25 regardless of the insolvency of Western and Access—the money was never an asset of those
 26 entities.

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1 **D. Defendants have not produced any admissible or relevant evidence against the**
2 **conclusion that any judgment may not be satisfied if a prejudgment writ does**
3 **not issue.**

4 An affidavit supporting issuance of a prejudgment writ of attachment may be based upon
5 the presumption of fraud. Bowers v. Beck, 2 Nev. 139 (1866). In Bowers, the defendant
6 indicated to the plaintiff that he was going to divest himself of the property upon which plaintiff
7 would seek to recover any judgment. Id. That was sufficient for the court to award a prejudgment
8 writ of attachment.

9 In this case, Defendants have already succeeded in making \$8.2 million disappear and
10 have provided absolutely no explanation for the disappearance of the money other than that
11 certain entities have "fallen on hard times." It is not a stretch to believe that any assets owned or
12 controlled by the Defendants will likewise fall on hard times rendering any judgment which
13 NADC obtains uncollectable.

14 A different scenario might unfold if Western and Access owed NADC the \$8.2 million
15 pursuant to a promissory note. In that instance, the money would not have belonged to NADC at
16 the time Western and Access filed bankruptcy. This case is extremely different. The collateral
17 reserve account was money which belonged to NADC and held in a fiduciary capacity by Western
18 and Access. The money was not proceeds from sales or income generated by Western. The
19 money was not even an investment fund for Western to manage. The collateral reserve account
20 was to be segregated from all other funds and held by Western but owned by NADC. The
21 Defendants have virtually stolen that money. This is not a case where the money was lost due to a
22 bad investment or a company went broke as a result of the economy. Rather the funds were
23 systematically depleted by the Defendants in a manner that was contrary to their representations
24 and contrary to the nature of the funds.

25 There is ample support for a presumption of fraud in this case and the notion that
26 Defendants will continue to run their companies in such a manner that ultimately nothing will be
27 left for NADC or any other victim to collect.

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1 **E. NADC is likely to succeed on the merits of its claims.**

2 NADC has asserted claims against Defendants for conversion, embezzlement, negligent
3 misrepresentation, fraud, fraudulent transfers, breach of fiduciary duty, civil conspiracy, and
4 constructive trust. In their opposition, Defendants iterate and reiterate that that Plaintiff's claims
5 are "conclusory and redundant" and that the allegations and supporting documents attached to the
6 motion are an insufficient basis upon which to base a writ of attachment. (E.g., Opp'n to Mot. at
7 12:21, Dkt. #23). Defendants, however, ignore the evidence cited in the First Amended
8 Complaint and attached to the motion for order to show cause wherein NADC has specifically
9 outlined misrepresentations made by individual Defendants, insider loans granted to the officers
10 and directors of Western Thrift & Loan, and the most obvious fact—\$8.2 million of NADC's
11 money controlled by the Defendants is unaccounted for.

12 Shaffer nonchalantly testified recently that \$4 million was transferred from the account
13 held by Access to Western to purchase Western stock. That is \$4 million of NADC's money used
14 by Defendants to purchase stock *in their own company*. (Mot. for Order at 7:1-3, Dkt. #16).
15 Access also purchased stock in Western Thrift & Loan and the money was then used to grant
16 loans to the officers of the banking entity including Shaffer and Scott Rottman. (*Id.* at 7:6-17).

17 Defendants are correct in stating that NADC does not have a clear understanding of where
18 all of the \$8.2 million has gone—Defendants have refused to produce this information in response
19 to demands made by NADC for an accounting. However, despite a lack of details, Plaintiff is still
20 likely to succeed on the merits of its claims for fraud, misrepresentation, conversion, and
21 embezzlement for the simple fact that NADC had \$8.2 million and that money has been converted
22 due to the actions and inaction of the Defendants.

23 **III. Conclusion**

24 The facts of this case are straightforward. NADC sent money to Western and Access to
25 hold in a fiduciary capacity. Of the \$8.25 million balance remaining, most or all of the money has
26 been misappropriated by the Defendants who have raised no legitimate defense to the allegations
27 and documented support provided by NADC in support of its motion for a prejudgment writ of
28 attachment. Defendants have demonstrated their willingness and ability, given the opportunity, to

deprive others of their assets and there is no reason to believe their behavior will change given the facts and extraordinary circumstances of this case. An order to show cause should be issued and a hearing held to determine whether a prejudgment writ of attachment should issue.

DATED this 22nd day of December, 2011.

JONES VARGAS

/s/ Wayne Klomp
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CERTIFICATE OF SERVICE

I certify that I am an employee of JONES VARGAS, and that on this date, pursuant to FRCP 5(b), I am serving a true and correct copy of the attached **REPLY IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE WHY PREJUDGMENT WRIT OF ATTACHMENT SHOULD NOT ISSUE** on the party(s) set forth below by:

Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices

Certified Mail, Return Receipt Requested

Via Facsimile (Fax)

Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

Federal Express (or other overnight delivery)

By Notice of Electronic Filing via the CM/ECF system as maintained by the Court Clerk's Office

as follows:

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DATED this 22nd day of December, 2011.

/s/ Michell L. Nobach
An employee of JONES VARGAS